Supreme Court, U.S.
FILED
MAR 19 1997
CLERK

No. 96-1293

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1996

LORI G. McKENZIE,

Petitioner,

vs.

RENBERGS INC., AND ROBERT L. RENBERG

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Tenth Circuit

THE SOCIETY FOR HUMAN RESOURCE MANAGEMENT'S *AMICUS CURIAE* BRIEF IN SUPPORT OF PETITIONER'S PETITION FOR A WRIT OF CERTIORARI

David E. Strecker, OBA #8687
Counsel of Record
Robert C. Fries, OBA #16958
Additional Counsel
STRECKER & ASSOCIATES, P.C.
Petroleum Club Building
601 South Boulder - Suite 412
Tulsa, Oklahoma 74119
(918) 582-1716
Attorneys for the Society for Human Resource Management

QUESTION PRESENTED FOR REVIEW

An employer fired its personnel manager because she reported, in good faith, to her superiors that they have deprived certain workers of overtime compensation due under the Fair Labor Standards Act. Is the employer immune from liability under the anti-retaliation provision of the Fair Labor Standards Act, 29 U.S.C. §215(a)(3), because the personnel director reporting unlawful employment practices was "just doing her job"?

PARTIES

LORI G. McKENZIE,

Petitioner,

and

RENBERGS, INC., and ROBERT L. RENBERG,

Respondents.

TABLE OF CONTENTS

QUESTION PRESENTED FOR REVIEW i

PARTIES ii

TABLE OF AUTHORITIES v

I. STATUE INVOLVED 1

II. INTEREST OF AMICUS 1

III. STATEMENT OF THE CASE 3

IV. SUMMARY OF ARGUMENT 5

V. ARGUMENT AND AUTHORITY WHY CERTIORARI SHOULD BE GRANTED 6

A. McKenzie's actions fall squarely within the intended protection of the anti-retaliation provision of the FLSA 6

B. The FLSA must be liberally construed to protect all employees from oppressive employment practices 10

C. Inclusion of McKenzie and other human resource professionals within the protective ambit of §215(a)(3) "maintain[s] unfettered access to statutory remedial mechanisms" 12

D. There is no authority to exclude a human resource professional from the protective ambit of §215(a)(3) because she was "just doing her job" 15

VI. CONCLUSION 19

APPENDIX A 21

TABLE OF AUTHORITIES

CASELAW

Burston v. Commomnwealth of Virginia, 35 FEP Cases 1825 (E.D. Va. 1984) 18

Chandler v. Fast Lane Inc., 868 F.Supp. 1138 (E.D. Ark. 1994)..... 18

Garcia v. San Antonio Metro Transit Authority, 469 U.S. 528 (1985) 16, 17

Kalman v. Grand Union Co., 443 A.2d 728 (N.J. Super. Ct. App. Div. 1982) 9

Klages v. Sperry Corp., 118 LRRM 2463 (E.D. Pa. 1984)... 9

Kristufek v. Hussmann Foodservice Co., 985 F.2d 364 (7th Cir. 1993)..... 19

Maldonado v. Metra, 743 F.Supp. 563 (N.D. Ill. 1990)..... 18

Mariani v. Rocky Mountain Hospital, 902 P.2d 429 (Colo. Ct. App. 1994) 9

McKenzie v. Renbergs, 94 F.3d 1478 (10th Cir. 1996).... 4, 15

Mitchell v. DeMario Jewelry, Inc., 361 U.S. 288 (1960) 6-9, 13, 14

Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505 (N.J. 1980)..... 9

Robinson v. Shell Oil Company, 1997 WL 63007 (U.S.) 12-15

Tennessee Coal, Iron & Railroad Co. v. Muscoda Local No. 123, 321 U.S. 590 (1944)..... 10-12

United States v. Rosenwasser, 323 U.S. 360 (1945) 10-12

Wallis v. J.R. Simplot Co., 26 F.3d 885 (9th Cir. 1994) 18, 19

York v. Wichita Falls, 944 F.2d 236 (5th Cir. 1991)..... 16, 17

STATUTES

The Fair Labor Standards Act, 29 U.S.C. § 215(a)(3) 1, 4-8, 10-12, 14-16,18,19

The Age Discrimination in Employment Act (ADEA), 29 U.S.C. §623(d)..... 5, 19

Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C §2000(e)(3)(a).....5, 12-15, 18, 19

I. STATUTE INVOLVED

§ 215. Prohibited acts; prima facie evidence

(a) After the expiration of one hundred and twenty days from June 25, 1938, it shall be unlawful for any person—...

(3) to discharge or in any other manner discriminate against any employee because such employee has filed any complaint or instituted or caused to be instituted any proceeding under or related to this chapter, or has testified or is about to testify in any such proceeding, or has served or is about to serve on an industry committee...

29 U.S.C. § 215(a)(3).

II. INTEREST OF AMICUS

The SHRM is the leading voice of the human resource profession, representing the interests of more than 70,000 individual professional and student members from around the world. It represents neither employers nor employees. Rather, it is an independent association of professionals, dedicated to (1) enhancing the role of the human resource expert in the community, and (2) achieving the highest ethical standards and levels of professionalism. These goals are accomplished through education, programs of certification, and development of local chapters of SHRM, where human resource professionals meet and exchange ideas and experiences.

The SHRM has its own Code of Ethics and is not unlike many other professional associations. SHRM is unique, however, in that its members are in a key position to achieve voluntary compliance with some of the most important laws passed in the last sixty years; laws designed to

improve the lot of working people and to eliminate oppressive and discriminatory working conditions. The primary goal of the Society and its members is to further effective personnel and human resource management. Accordingly, SHRM has a direct interest in the development and enforcement of the myriad laws and regulations governing every aspect of employment.

As human resource professionals, SHRM members work directly with a great variety of employers and employees from all backgrounds on a wide range of employment issues. Through this work, SHRM members gain immeasurable insight into employer wage and hour practices and the effect of new and existing laws, regulations and court decisions. In their front line positions in the workforce, SHRM members are among the first individuals to perceive the inevitable, unforeseen effects that result when such laws, regulations, court decisions and programs are applied in the workplace. Thus, SHRM members are uniquely qualified to (1) bring relevant matters to the attention of the Court which have not been raised by the parties, and (2) comment upon the potential impact of the Court's action in this proceeding.

Every member of the Society is responsible for upholding all laws relating to employer activities and providing advice and guidance to their employers regarding the obligations imposed on employers by statutes such as the FLSA. Though the SHRM membership is diverse, the members share a single concern: they are unified in their belief that the decision of this Court would have a direct and dramatic impact on the ability of human resource professionals to properly perform their jobs.

III. STATEMENT OF THE CASE

Lori G. McKenzie (McKenzie) began working for Renbergs, Inc. (Renbergs), as a receptionist in July 1984, and was quickly promoted to assistant personnel director in October 1984. In May 1985, she was named personnel director, thus becoming responsible for Renbergs' compliance with both state and federal laws relating to equal employment opportunity, wage and hour matters, and numerous other employment related laws regulating the workplace. See Answer Brief of Appellee, pp. 6, ¶2 & 7, ¶4.

In August 1991, Marsha McElroy (McElroy), Renbergs' personnel controller, attended a wage and hour seminar. After the seminar, McElroy advised McKenzie she was worried about several wage issues at Renbergs, and asked McKenzie to review the seminar materials she received. After reviewing the materials, discussing the matter with McElroy and Renbergs' payroll manager, Garnetta Glissman, and reviewing Renbergs' payroll records and time cards, McKenzie believed Renbergs' compensation practices for sales associates and department managers were not in compliance with the FLSA. Specifically, McKenzie believed these employees were improperly classified as exempt from the FLSA and thereby denied overtime compensation. See App. App., pp. 66-76.

McKenzie decided to report the problems to Renbergs' labor attorney, Steve Andrew (Andrew). On September 4, 1991, McKenzie and McElroy met with Andrew and McKenzie told him Renbergs was not in compliance with the FLSA. Later that same day, McKenzie informed Renbergs' president, Robert L. Renberg of the wage and hour problems. McKenzie continued her efforts to resolve the problems by calling Andrew several times to discuss the matter. McKenzie also told Mr. Renberg on September 6, 1991, Andrew had not returned her calls and

she was still concerned with the wage practices. Two weeks later, Mr. Renberg fired Mckenzie stating he had "lost confidence" in her. See App. App., pp.78-85, 88-90.

McKenzie filed a wrongful termination suit under Section 215(a)(3) of the FLSA against Appellees, Renbergs and Mr. Renberg. The jury returned a verdict in favor of McKenzie upon this claim, finding McKenzie "was terminated by [the Respondents] in retaliation for reporting her belief that Renbergs was in violation of the Fair Labor Standards Act." Despite the jury's finding, the District Court, thereafter, entered judgment as a matter of law for Renbergs. The court reasoned even if McKenzie had been unlawfully retaliated against, Renbergs could not have been held liable under the FLSA because Renbergs would have been justified in firing her for notarizing a "sex contract". McKenzie appealed. See Appellant's Brief in Chief, pp. 2-4.

Although the Tenth Circuit rejected the lower court's reasoning, the appellate court affirmed the trial court's decision in favor of the Appellees on alternative grounds holding McKenzie had not engaged in activity protected under §215(a)(3). McKenzie v. Renbergs, 94 F.3d 1478 (10th Cir. 1996). The court reasoned that when McKenzie informed the company of its FLSA violations, she did not *assert* a right adverse to the company, but rather, she merely acted as personnel director on behalf of the company. Id. at 1486.

McKenzie petitioned for rehearing and the SHRM submitted an *amicus curiae* brief in support of McKenzie's petition. The Tenth Circuit, however, denied McKenzie's Petition for Rehearing and McKenzie initiated the instant proceeding.

IV. SUMMARY OF ARGUMENT

The Tenth Circuit's decision poses the potential for extensive destructive effects on the human resource community. In holding a human resource director's intra-corporate reports of federal wage and hour violations is not activity protected by the FLSA, the Tenth Circuit has impermissibly excluded such individuals from FLSA retaliation protection. The analysis of the Tenth Circuit in affirming judgment as a matter of law granted in favor of Renbergs is incorrect and inconsistent with (1) FLSA law, and (2) the essential purpose of employment related anti-retaliation statutes.

A critical review of FLSA precedent reveals the long-standing position of this Court that (1) the purpose of the FLSA was to protect workers from unfair or oppressive employment practices, and (2) the protective scope of the FLSA must be liberally construed so as to effectively provide this protection. Similarly, an insightful review of federal case-law applying the anti-retaliation provisions of several employment related statutes including, but not limited to, the FLSA, 29 U.S.C. §215(a)(3), Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C §2000(e)(3)(a), and the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §623(d), demonstrate an employee's intra-corporate report of unlawful conduct is protected activity even if making such a report is "just doing her job". For these reasons, the Petition for a Writ of Certiorari should be granted.

V. ARGUMENT AND AUTHORITY WHY CERTIORARI SHOULD BE GRANTED

A. MCKENZIE'S ACTIONS FALL SQUARELY WITHIN THE INTENDED PROTECTION OF THE ANTI-RETALIATION PROVISION OF THE FLSA

Voluntary compliance with employment laws is favored and encouraged. Intense, ever-present governmental regulation and prosecution is abhorrent in our society and should be used as a last resort. Voluntary compliance cannot be achieved, however, if an employee, including a personnel director, fears she may be fired or otherwise jeopardize her job by reporting her employer's wage/hour violations. In any company, the individual performing the human resource function is the key person to achieve voluntary compliance with the law.

In 1960, this Court firmly articulated the public policy which Congress sought to promote in enacting §215(a)(3) of the FLSA. In Mitchell v. DeMario Jewelry, Inc., 361 U.S. 288 (1960), this Court stated:

> the central aim of the [FLSA] was to achieve, in those industries within its scope, certain minimum labor standards....For weighty practical and other reasons, Congress did not seek to secure compliance with prescribed standards through continuing detailed federal supervision or inspection of payrolls. Rather, **it chose to rely on information and complaints received from employees seeking to vindicate rights claimed to have been denied. Plainly, effective enforcement could thus only be expected if employees felt free to approach officials with their grievances.** This end the prohibition of §15(a)(3) against discharges and other discriminatory practices was designed to serve...By its proscription of retaliatory acts set forth in §15(a)(3),...Congress

> sought to foster a climate in which compliance with the substantive provisions of the [FLSA] would be enhanced.[1]

The FLSA was designed to prevent employee reports of unlawful activity from taking on the character of a "calculated risk". Id. at 292-93. Employees may feel reporting such activity presents a situation wherein the employee must weigh the effort to correct deficiencies under the FLSA against the risk of discharge and total loss of wages. Id. In this situation, the Court concluded:

> employees understandably might decide that matters might be best left as they are. We cannot read the Act as presenting those it sought to protect with what is little more than a Hobson's choice.

Id.

The effect of DeMario is clear. The FLSA's anti-retaliation provision was designed to encourage employees to report employment practices which do not comply with the requirements of the Act without fear that such reports will jeopardize their jobs. In short, if an employee reports her employer's violations of the FLSA, then she is protected by the FLSA's anti-retaliation provision.

The Tenth Circuit's decision below, that the reports of FLSA violations McKenzie made to her superiors do not constitute protected activity under §215(a)(3), clearly contradicts DeMario. The fundamental purpose of §215(a)(3) was to encourage voluntary compliance with the FLSA by protecting employees from retaliation for identifying employer violations of minimum labor standards. Personnel directors and other human resource professionals are employees specifically hired by employers to, among other things, identify such violations. When they do, they should not be subject to punishment without recourse to the very laws they seek to uphold. Thus, reports of noncompliance by

---

[1] Id. at 292 (emphasis added).

personnel directors and human resource professionals are squarely within the group of actions protected in order to encourage voluntary compliance with the FLSA. Employees such as McKenzie, as the DeMario Court stated, must "feel free to approach officials about...grievances."

Excluding human resource professionals from the protective ambit of §215(a)(3) will have devastating effects on the accomplishment of Congress' intent. The decision of the Tenth Circuit in this case will in fact discourage personnel directors, human resource directors, equal employment opportunity coordinators, and other like employees from investigating and reporting actual FLSA violations, potential violations, and violations of other employment laws. Such employees may choose to hide their FLSA concerns rather than risk jeopardizing their job security. Voluntary compliance cannot be achieved when employees like McKenzie are encouraged to hide their knowledge or suspicions of violations of the FLSA.

Moreover, the Tenth Circuit's decision creates a Hobson's Choice for human resource professionals. They must choose between: (a) voicing FLSA concerns, thus subjecting themselves to discharge for "doing their job", or (b) failing to make known their FLSA concerns, thus being subject to discharge for "**not** doing their job". The latter choice carries the additional risk that yet undisclosed FLSA violations will continue to harm innocent employees who are not aware of the rights they are being denied. Notions of common sense and fairness dictate human resource professionals should not be forced to make this "no-win" choice.

An additional Hobson's choice is created when one considers the SHRM's Code of Ethics its 70,000 human resource professional members must abide by. See Appendix

A.[2] The Tenth Circuit's decision forces those persons to choose between (a) fulfilling their ethical obligations by reporting FLSA violations and then being subject to discharge, or (b) ignoring their ethical duties to protect their jobs. This result ignores the fact the SHRM Code of Ethics promotes voluntary compliance with the law and, therefore, is directly supportive of the public policy pronounced in DeMario.[3] The Tenth Circuit's decision renders the SHRM's Code of Ethics virtually meaningless. By holding a personnel director's intra-corporate reports of FLSA violations are not protected, the appellate court extinguished the legal protections of the FLSA thereby placing a heavy burden on all human resource professionals who discharge their ethical duties.

In sum, the ruling of the Tenth Circuit poses the precise result this Court feared and concluded in DeMario the FLSA was intended to prevent. Accordingly, the Court must grant certiorari and find McKenzie engaged in activity protected by the FLSA in order to promote voluntary compliance with the law.

---

[2] McKenzie's actions taken on behalf of the sales associates and department managers are in conformity with the SHRM Code of Ethics in all respects.

[3] Courts have noted the importance of professional ethics codes. See Pierce v. Ortho Pharmaceutical Corp., 417 A.2d 505 (N.J. 1980)(holding a professional code of ethics may express a clear mandate of public policy); Mariani v. Rocky Mountain Hospital, 902 P.2d 429 (Colo. Ct. App. 1994)(finding wrongful discharge claim established by accountant discharged for complying with Colorado State Board of Accountancy Rules of Professional Conduct); Kalman v. Grand Union Co., 443 A.2d 728 (N.J. Super. Ct. App. Div. 1982)(ruling pharmacist's discharge voidable as contrary to public policy where employer terminated pharmacist after he reported employer's attempt to flout state regulations as required by the Code of Ethics of the American Pharmaceutical Association); Klages v. Sperry Corp., 118 LRRM 2463 (E.D. Pa. 1984)(finding attorney's code of professional ethics defined public policy supporting wrongful discharge claim for corporate general counsel terminated after attempting to investigate potential violations of federal and state securities laws.

B. THE FLSA MUST BE LIBE[RALLY CONSTRUED TO PROTECT ALL EMI]PLOYEES FROM OPPRESSIVE EMPLOYM[IENT PRACTICES]

To hold a personnel director[']s intra-corporate reports of wage/hour violations is not protected activity under §215(a)(3) contradicts **this Court['s long-standing policy that the FLSA must not be narro]wly interpreted so as to hinder the protective purpose of t[he FLSA.** In Tennessee Coal, Iron & Railroad Co. v. Musc[oda Local No. 123, 321 U.S. 590 (1944), this Court was co]nfronted with determining whether underground travel in iro[n ore mines constitutes work or employment for which cor[mpensation must be paid within the meaning of the FLSA. In light of conflicting interpretations based on the actua[l activities pursued and prior custom and contract in the min[es, this Court articulated how the FLSA must be construed. T[his Court stated:

> Such an issue can be reso[lved only by discarding formalities and **adopting a realistic attitude**, recognizing that we are dea[ling with human beings and with a statute that is inte[nded to secure to them the fruits of their toil and exer[tion.

Id. at 592 (emphasis added). The Co[urt applied this "realistic attitude" to the definitions of "em[ploy" and "production" contained in the FLSA and held t[he employees must be compensated for the underground t[travel time. The Court reasoned **the FLSA is remedial and humanitarian in purpose and, therefore, "must n[ot be interpreted or applied in a narrow, grudging manner."** Id. at 597 (emphasis added).

Similarly, in United States v. Rosenwasser, 323 U.S. 360 (1945), faced with determining w[hether the FLSA covers piece-rate employees so as to subject[t their employers to the FLSA's criminal provisions, this Cour[t explained the intended purpose and construction of the FLSA as follows:

> Neither the policy of the Act nor the legislative history gives any real basis for excluding piece workers from the benefits of the statute. This legislation was designed to raise substandard wages and to give additional compensation for overtime work as to those employees within its ambit, thereby helping to protect this nation from the evils and dangers resulting from wages too low to buy the bare necessities of life and from long hours of work injurious to health. No reason is apparent why piece workers who are underpaid or who work long hours do not fall within the spirit or intent of this statute, absent an explicit exception as to them.

Id. at 361. Finding support for its conclusion in the express language of the FLSA, the Court added:

> A broader or more comprehensive coverage of employees within the stated categories would be difficult to frame. [Congress'] use of the words "each" and "any" to modify "employee," which in turn is defined to include "any" employed individual, leaves no doubt as to the Congressional intention to include all employees within the scope of the Act unless specifically excluded.

Id. at 362-63 (citing 81 Cong. Rec. 7657, Senator Black's statement on the floor of the Senate that under the FLSA the term "employee" had been given "the broadest definition that has ever been included in any one act").

This Court's decisions in Muscoda and Rosenwasser demonstrate the protective scope of the FLSA must be liberally construed regardless of whether it is the overtime compensation, anti-retaliation, or any other provision of the FLSA which is at issue. **The FLSA *as a whole* was designed "to protect this nation from the evils and dangers resulting from" unfair and oppressive employment practices. Therefore, the FLSA *as a whole* must be liberally interpreted in its application.** Moreover, §215(a)(3) clearly states employers may not retaliate against

"any employee" on account of the employee's report of unlawful activity. In short, §215(a)(3) protects all employees from retaliation, not all employees except those who report wage/hour violations in their capacity as a human resource professional. Such an exception cannot be read into the FLSA.

To protect human resource professionals, like McKenzie, from retaliation due to internal reports of wage/hour violations facilitates the remedial and humanitarian purpose of the FLSA. This policy underlying the FLSA was not intended to be filled with technicalities, therefore, the Court should grant certiorari and adopt the "realistic attitude" articulated in Muscoda.

C. INCLUSION OF MCKENZIE AND OTHER HUMAN RESOURCE PROFESSIONALS WITHIN THE PROTECTIVE AMBIT OF §215(a)(3) "MAINTAIN[S] UNFETTERED ACCESS TO STATUTORY REMEDIAL MECHANISMS"

Interpreting the protective scope of an employment-related anti-retaliation provision is not an issue foreign to this Court. In fact, the Court very recently was asked to determine whether Section 704(a) of Title VII of the Civil Rights Act of 1964, (a) protected "former employees" from unlawful retaliation such that a former employee may sue a former employer for allegedly retaliatory post-employment actions, or (b) only protected "current employees" from retaliatory action s of employers.

In Robinson v. Shell Oil Company, 1997 WL 63007 (U.S.), Charles Robinson Sr. filed a charge with the EEOC

claiming Shell Oil Co. unlawfully discharged him on account of his race. While that charge was pending, Robinson applied for a job with another company. That company contacted Shell, as Robinson's former employer, for an employment reference. Robinson subsequently filed suit under §704(a) against Shell alleging unlawful retaliatory discrimination. Robinson claimed Shell gave him a negative reference in retaliation for his having filed the EEOC charge. Adhering to Fourth Circuit precedent that §704(a) does not apply to former employees, the district court dismissed Robinson's action. The Fourth Circuit affirmed the dismissal and Robinson appealed.

The Supreme Court reversed the appellate court's decision and held that "former employees" are included within the protective ambit of §704(a). Robinson at 5. Justice Thomas delivered the opinion of the Court and explained several grounds underlying the Court's decision. Id. at 3-5. First, the Court reviewed the express language of §704(a) and found that "there is no temporal qualifier in the statute such as would make plain that §704(a) protects **only** persons still employed at the time of the retaliation." Id. at 3 (emphasis added). Second, the Court looked at Title VII's definition of "employee" and found that it "likewise lacks any temporal qualifier" limiting its meaning to current employees. Id. Third, relying upon its interpretation of the FLSA's anti-retaliation provision in DeMario, *supra*, the Court stated that a primary purpose of anti-retaliation statutes is "maintaining unfettered access to statutory remedial mechanisms". The Court found that "it would be destructive of this purpose...for an employer to be able to retaliate with impunity against an entire class of acts under Title VII",

therefore, former employees are included within §704(a)'s coverage.

This Court's analysis of the scope of anti-retaliation provisions in Robinson is directly applicable to the instant case. In Robinson, this Court was asked to determine whether Title VII's anti-retaliation provision protects (a) all employees (current and former), or (b) all employees **except** "former employees". Similarly, in the instant action this Court is asked to determine whether the FLSA's anti-retaliation provision protects (a) all employees who report violations of the FLSA, or (b) all employees who report violations of the FLSA **except** human resource professionals.

The SHRM believes the Court should reach the same conclusions here that it reached in Robinson and, in accordance with those conclusions, find that McKenzie is protected under the FLSA. First, the express language of the FLSA's anti-retaliation provision, like §704(a) of Title VII, does not limit its protective scope to a particular class of employees. There are no qualifiers which evidence a clear intent to exclude human resource professionals or other like employees from the protective scope of §215(a)(3). Likewise, the FLSA's definition of "employee" lacks any qualifiers limiting its meaning to all employees except human resource professionals who by reporting FLSA violations are "just doing their job". Third, a primary purpose of the FLSA's anti-retaliation provision is to "maintain unfettered access to statutory remedial mechanisms". This purpose clearly underlies §215(a)(3) considering the fact that this Court relied upon its interpretation of the FLSA's anti-retaliation provision in DeMario to support its holding and interpretation of Title VII's anti-retaliation provision in Robinson.

McKenzie's termination from employment at Renbergs for reporting FLSA violations constitutes a cognizable retaliation claim under the FLSA. This Court's finding in Robinson, that §704(a) of Title VII protects all employees (including former employees) from unlawful retaliation, was based on the **same authority and reasoning now offered by the SHRM** to support a finding that §215(a)(3) protects all employees (including human resource professionals) from unlawful retaliation. The FLSA cannot provide an effective remedy for retaliation if the Court allows the fear of retaliation to deter McKenzie and every other personnel director, equal employment coordinator, human resource director, or similar official from making good faith reports of company FLSA violations. For these reasons, this Court should grant McKenzie's Petition for a Writ of Certiorari and reverse the Tenth Circuit's decision to exclude McKenzie from the protective scope of §215(a)(3).

D. THERE IS NO AUTHORITY TO EXCLUDE AN EMPLOYEE FROM THE PROTECTIVE AMBIT OF §215(a)(3) BECAUSE SHE WAS "JUST DOING HER JOB"

The Tenth Circuit ruled McKenzie was not protected under §215(a)(3) of the FLSA because she "never crossed the line from being an employee merely performing her job...to an employee lodging a personal complaint about the wage and hour practices of her employer and *asserting* a right adverse to the company". McKenzie, *supra* at 1486. The effect of the appellate court's ruling is that any employer can terminate its human resource professional who discovers and informs the employer it may be violating the FLSA. McKenzie's Petition for a Writ of Certiorari must be granted

to correct this result. The notion that "just doing one's job" excludes a human resource professional from the protective scope of §215(a)(3) must be rejected.

In 1991, the United States Court of Appeals for the Fifth Circuit defined what it means to "assert FLSA rights" under §215(a)(3). In York v. Wichita Falls, 944 F.2d 236 (5th Cir. 1991), Gary Broyles, Battalion Chief and union president, showed the Fire Chief for the City of Wichita Falls, Texas, a memo discussing a recent decision handed down by this Court and asked if the fire fighters were due any overtime pay in light of the Court's decision.[4] The City subsequently reduced the fire fighter's wage rate to offset the increased cost of overtime pay. All 139 fire fighters employed by the City filed suit against the City claiming that the City unlawfully reduced their wage rate in response to their assertion of coverage under the FLSA. The district court concluded the FLSA's assertion of coverage requirement should be liberally construed, therefore, Broyles' conversation with the Fire Chief constituted an "assertion of coverage" for all fire fighters under the FLSA, bringing them within its protective scope. The City appealed.

Affirming the lower court, the Fifth Circuit defined the "assertion of coverage" requirement of §215(a)(3) as follows:

> Because [the FLSA] prohibits an employer's retaliatory acts because an employee assets coverage, the employee must take some actions which a reasonable employer would consider an assertion that

---

[4] Broyles' memo discussed Garcia v. San Antonio Metro Transit Authority, 469 U.S. 528 (1985), which recognized public and private employers have to meet the overtime and minimum-wage requirements of the FLSA.

> employees are entitled to the overtime pay or other benefits conferred by the FLSA.

York at 241. Applying this definition and ruling "one employee may assert coverage on behalf of all...and the fact the person who asserted coverage may...be...exempt from the FLSA is not fatal", the court held Broyles' inquiry regarding the effect of the Garcia decision could constitute a reasonable assertion of coverage. Id. Furthermore, considering the fact Broyles was a union leader, the court ruled the City should have reasonably viewed Broyles as a spokesman for the fire fighters as a whole. Id.

Applying York to the case at bar, it is plain that McKenzie's acts constituted an "assertion of FLSA coverage." The facts in York are strikingly similar to the facts presented to this Court. First, McKenzie took actions which a reasonable employer would consider an assertion of rights under the FLSA. McKenzie discovered certain employees were entitled to overtime compensation they were not receiving and, like Broyles, she reported this information to her superiors. McKenzie's continued pursuit of attention and action form her superiors certainly amounts to "advocating the rights of' or "asserting coverage on behalf of' the sales associates and department managers.

Second, McKenzie reasonably should have been viewed as a spokesperson for the lawful rights of Renberg' employees as a whole. As personnel director, one of the core purposes of McKenzie's employment was to ensure Renbergs' observance of rights granted to all its employees by federal and state labor and employment statutes, including the FLSA. Her duties were: (a) determining whether

Renbergs was complying with the FLSA; (b) if Renbergs was not in compliance, attempting to achieve voluntary compliance; and (c) keeping Renbergs in compliance. By holding McKenzie's actions do not amount to "asserting a right adverse to the company," the Tenth Circuit failed to consider this core purpose of McKenzie's employment. McKenzie and every other personnel director, equal employment coordinator, human resource director, or similar official, who makes good faith reports of company FLSA violations and inquiries of potential violations must be protected under §215(a)(3). Such acts are fundamentally "assertions of employee rights."

The SHRM's position is consistent with the treatment of human resource professionals under anti-retaliation provisions in other employment-related statutes. The anti-retaliation provisions of Title VII and the ADEA have been interpreted to protect human resource professionals and other employees who inform their employers that they are acting unlawfully.[5] The import of these decisions is clear. Human

---

[5] See Maldonado v. Metra, 743 F. Supp. 563 (N.D. Ill. 1990)(holding Title VII's anti-retaliation provision protects personnel director who made comments to superiors that employer's hiring practices possibly discriminated against minorities); Chandler v. Fast Lane, Inc., 868 F. Supp. 1138 (E.D. Ark. 1994)(ruling manager exercising authority to promote and employ African-Americans engaged in protected activity under Title VII); Burston v. Commonwealth of Virginia, 35 FEP Cases 1825 (E.D. Va. 1984)(finding equal employment opportunity officer terminated in retaliation for aggressive activities on behalf of minorities engaged in protected activity under Title VII); Wallis v. J.R. Simplot Co., 26 F.3d 885 (9th Cir. 1994)(holding human resources director proposed speech to employer's management personnel which he shared with this employer constituted protected activity under Title VII); Kristufek v. Hussmann Foodservice Co., 985 F.2d 364 (7th Cir.

resource professionals, like McKenzie, are protected from retaliation even if they are "just doing their job" by reporting noncompliance with the law to their employers.

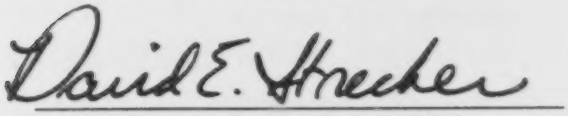
VI. CONCLUSION

It is true that McKenzie's job was to ensure compliance with the FLSA. In doing her job to the utmost, she lost it. This is unjust. Even more unjust is the icy judicial reception given to one who sought to uphold a law which this Court has said must protect as many people as possible. McKenzie's Petition for a Writ of Certiorari should be granted because her cause and that of those she sought to protect are one and the same. If McKenzie loses, so does the worker.

1993)(finding human resources executive engaged in ADEA protected activity when he informed his employer on several occasions that terminating an employee would violate the ADEA).

Respectfully submitted,

STRECKER & ASSOCIATES, P.C.



David E. Strecker, OBA #8687
Counsel of Record
Robert C. Fries, OBA #16958
Additional Counsel
Petroleum Club Building
601 South Boulder - Suite 412
(918) 582-1716
(918) 582-1780 (fax)
Attorneys for the Society for Human Resource Management

Dated this 19th day of March, 1997.

APPENDIX A

HR
SOCIETY FOR
HUMAN
RESOURCE
MANAGEMENT

CODE OF ETHICS

As a member of the Society for Human Resource Management, I pledge myself to:

- Maintain the highest standards of professional and personal conduct.
- Strive for personal growth in the field of human resource management.
- Support the Society's goals and objectives for developing the human resource management profession.
- Encourage my employer to make the fair and equitable treatment of all employees a primary concern.
- Strive to make my employer profitable both in monetary terms and through the support and encouragement of effective employment practices.
- Instill in the employees and the public a sense of confidence about the conduct and intentions of my employer.
- Maintain loyalty to my employer and pursue its objectives in ways that are consistent with the public interest.

- Uphold all laws and regulations relating to my employer's activities.
- Refrain from using my official positions, either regular or volunteer, to secure special privilege, gain or benefit for myself.
- Maintain the confidentiality of privileged information.
- Improve public understanding of the role of human resource management.

This Code of Ethics for members of the Society for Human Resource Management has been adopted to promote and maintain the highest standards of personal conduct and professional standards among its members. By joining the Society, a member espouses this Code, thereby assuring public confidence in the integrity and service of human resource management professionals.